IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2008 Session

STATE OF TENNESSEE v. DANIEL POTTEBAUM

Direct Appeal from the Criminal Court for Davidson County
No. 2002-C-1808 Cheryl A. Blackburn, Judge

No. M2007-02108-CCA-R3-CD - Filed December 30, 2008

A Davidson County jury convicted the Defendant of two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault. The trial court ordered him to serve an effective sentence of seventy-four years. On appeal, the Defendant claims the trial court erred when it: (1) permitted the State to question the victim about the Defendant's prior bad acts; (2) did not dismiss Count 1 of the indictment pursuant to the cancellation rule; (3) instructed the jury that "recklessness" was sufficient as a *mens rea* for rape of a child; (4) determined that the evidence supported the verdicts; (5) enhanced the Defendant's sentence and ordered him to serve consecutive sentences. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the Defendant, Daniel Pottebaum.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Brian K. Holmgren, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Procedural History

In September 2002, a Davidson County grand jury indicted the Defendant on two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault. He was tried and found guilty on all counts in March 2004. On appeal, this Court reversed and remanded for a new trial based on two prejudicial errors. *State v. Daniel E. Pottebaum*, No. M2004-02733-CCA-R3-CD, 2006 WL 1222710 (Tenn. Crim. App., at Nashville, May 5, 2006), *no Tenn. R. App. P. application filed*. The trial court conducted a new trial, and the Defendant was again found guilty on all counts and sentenced to served seventy-four years.

II. Facts

A. Trial

At trial, the State presented the following evidence: J.P.[1], an eighth-grader, testified that when she was seven years old her father, the Defendant, sexually assaulted her. At the time of the assault, J.P. lived with her mother, Emily Pottebaum; her brother D. P.; her brother A.G.; and the Defendant. The Defendant had lived with her family for only "a couple of weeks" prior to the conduct at issue in this case, but he had visited them briefly before.

Describing the first incident, J.P. testified that she was alone at home with her father when he came into her room. She said, "[I]t all just kind of happened," and then she elaborated, "He told me to lay down, and I did. And then he started pulling my clothes off, and I was asking him what he was doing. And he said, I'm just – just cooperate." She stated that the Defendant removed her pants and underwear and he, using one hand, "rubb[ed]" her genital region for "a few minutes." She also recalled that the Defendant was at "[t]he end of the bed on his knees." J.P. said the touching made her feel "[v]ery uncomfortable." After the Defendant finished, and she got dressed, he told her not to "tell her mom or anybody."

J.P. then described the second incident of her father's conduct: after her mother left the house to check the mail, her father approached her in the living room, where she was on the couch watching television. J.P. said, "[H]e just like tapped my shoulder and like – and I like laid down like that (indicating)." The Defendant then pulled her pants and underwear down to her ankles and licked her "private part." Afterwards, he told her not to tell anyone. She said that it only lasted "a few minutes." J.P. admitted that she was "extremely uncomfortable when he licked her private region." She also explained that, since her father had a beard, it was "scratchy, scratchy" when he licked her.

J.P. said the third incident took place in her bedroom: "He came into my room and except

[1] Given the nature of the crimes, we will refer to all children by their initials for their privacy.

this time he told me to lay down like the first time. . . . And he pulled down my pants and underwear to my ankles, and then he licked my private part." J.P. said that no one else was home. She said that after the contact, the Defendant asked her, "[Y]ou haven't told, have you[?]" and warned her that, if she told, "he would more than likely go to jail." J.P. said she took that seriously because she did not want her father to go to jail.

J.P. described the fourth incident, which happened in her room when the Defendant attempted to make her touch him. She said, "[H]e sat down next to me, and he started to unbutton his pants. And then he pulled them down to his ankles and then he – he like – he like grabbed the back of my head and tried to force it down, but I jerked away." She said the tip of her lips touched "the tip of his private part," but his penis did not go in her mouth. The Defendant asked her why she jerked her head away, and she told him that she felt it was wrong. He then "pulled his pants up and left out of the room." J.P. reported that the Defendant's penis had a medium-sized slit in the end of it, and she said that she had never seen his penis before.

The fifth incident involved the Defendant calling J.P. into the bedroom he shared with her mother. When she entered the room, he "pulled his pants down to his ankles. And then he had his hand around his private part, and he was moving it . . . up and down." She said he continued for three to five minutes until white "stuff" came out the tip and went "into his hand."

J.P. testified that during the sixth incident, no one else was home with her and the Defendant, and she was in her mother's bedroom. The Defendant removed her clothes, laid her on the bed, spread her legs, and touched her with three fingers on her genital region.

J.P. stated that the seventh incident involving the Defendant was when he called her into her mother's bedroom, and he began playing a pornographic movie upon her entry. J.P. said a friend knocked on the door, so she yelled for the person to come in the house. She then ran downstairs to let the friend in the house and to "get out of there as soon as possible." When she left the room, the Defendant told her, "[D]on't forget, don't tell or I won't be around anymore."

J.P. said she initially told her mom about the touching on May 14, 2000, which was Mother's Day. Her mom had asked both her and her brother whether there was anything they wanted to tell her while the Defendant was out of the house. J.P. testified that she then told her about the touching. Her mom told her to get dressed and they went to the home of "Aunt Denise," their mother's friend. While at Aunt Denise's house, J.P. spoke with Stanley Cook, the Department of Children's Services (DCS) investigator, and told him what happened.

J.P. said that before the touching began, she and her father had a "regular father-daughter relationship." She also said, "He was my dad, I couldn't stop loving him or anything." J.P.

acknowledged that her father occasionally spanked her, and she specifically recalled that he spanked her on Mother's Day for leaving the house too early.

On cross-examination, J.P. said that her father only lived with them for six weeks. She explained that her mom asked if there was anything they wanted to tell her without their father around because they would not tell their father bad things they had done. J.P. said that the Defendant worked while her mother stayed at home. J.P. admitted that, when she was examined and interviewed by Phyllis Thompson at Our Kids' Clinic, a facility that performs physical examinations of children alleged to be sexually abused, she did not tell Thompson about the oral sex. Additionally, J.P. did not reveal to Thompson that she had previously accused her brother D.G. of sexual abuse. J.P. said she lived at the time of trial with her mother, her mother's fiancé, her brother D.P., and D.P's girlfriend.

On redirect examination, J.P. said, regarding the claim of sexual abuse against her brother D.G. that she did not reveal to Thompson, D.G. was seventeen or eighteen years old when he touched and licked her in her genital region. J.P. also stated that, when her father masturbated, he wanted her to watch.

Emily Pottebaum, J.P.'s mother, testified that she had four children: A.G.; D.G.; D.P.; and J.P. She claimed that she was the common law wife of the Defendant. The Defendant lived with her, D.P., J.P., and A.G. for almost a month in April and May of 2000. She said that, although this was the longest time the Defendant had ever spent with J.P., "[w]hen [the Defendant] came to visit, [J.P.] adored him." The Defendant was employed sporadically while he lived with them, and Emily said she was employed until the end of his visit. She stated that, while he was there, she occasionally left the children alone with the Defendant. Mrs. Pottebaum testified that J.P. began to soil herself when the Defendant moved into their house and that the Defendant punished J.P. for this by spanking her.

Mrs. Pottebaum said that, on Mother's Day 2000, the family woke up normally, and, while the children normally went to church, J.P. did not want to go that morning. Instead, J.P. walked out the front door in a long t-shirt. The Defendant became angry at J.P., and "[h]e whipped her real hard." Mrs. Pottebaum said that she and the Defendant then visited a friend for awhile. She left the friend's house early and returned to her house. While at her own house, Mrs. Pottebaum asked D.P. and J.P. if there was anything they wanted to tell her while the Defendant was not there. J.P. then revealed that the Defendant "had been touching her down there." Mrs. Pottebaum said she called her friend Denise and took the children to Denise's house. She said the Defendant saw them driving away, and Mrs. Pottebaum told him that they were just visiting Denise.

After arriving at Denise's house, Mrs. Pottebaum called the police, and a detective, a police officer, and a DCS investigator were dispatched. DCS Investigator Cook spoke with J.P. outside

the house. Mrs. Pottebaum related that J.P. briefly received counseling at the Rape Crisis Center and that she was physically examined at Our Kids' Clinic. Mrs. Pottebaum said she never really spoke with J.P. about what happened.

Mrs. Pottebaum stated that she kept pornographic movies in a box in her closet. She testified that the Defendant knew about the movies, but J.P. did not. Mrs. Pottebaum also said she had not yet taught J.P. about sexual activities or behavior. Mrs. Pottebaum categorized the "hole on the end [of the Defendant's penis as] very large" and described it as a distinguishing characteristic. She stated that J.P. would not have a reason to know about the Defendant's penis. She also said that the Defendant had a beard when he lived with them.

Mrs. Pottebaum then described a domestic dispute she had with the Defendant: she said that on Friday, May 12, 2000, two days before Mother's Day 2000, she and the Defendant got into an argument after he had been drinking. He hit her on her head with his fists about six times; and, she kept her face covered throughout the dispute. Mrs. Pottebaum reported the abuse two days after Mother's Day 2000. When the police tried arresting the Defendant for domestic abuse, he fled to Kentucky.

On cross-examination, Mrs. Pottebaum stated that the fight between her and the Defendant happened in the early evening, around 7:30 or 8 P.M., and she said one of her male friends was present. Mrs. Pottebaum said that her head did not originally bruise but that the bruise which developed "bled down" into her face. Mrs. Pottebaum blamed the Defendant's "severe" drinking problem for the loss of his welding job. She added that she thought the Defendant's spanking was "excessive, but [she] didn't say anything about it [because he was the children's] father."

Mrs. Pottebaum stated that, usually, the children would take a bus to Christ Church on Sunday mornings, and she agreed that church was a "big part of their lives." She explained that, on Mother's Day 2000, she asked whether J.P. had anything to tell her because she wanted to know why J.P. did not want to go to church. Mrs. Pottebaum said she knew very little about the abuse J.P. suffered. She did admit that J.P. lied when she spilled a drink and did not want to get in trouble.

On redirect examination, Mrs. Pottebaum agreed that, after Mother's Day 2000, J.P. revealed that her brother D.G. had "lick[ed] on her and touch[ed] on her." She again acknowledged J.P. had "some problems telling the truth." Additionally, Mrs. Pottebaum stated that, when the Defendant called her while he was in Kentucky, she accused him of molesting J.P.

Danny Warren, an ex-Metro police officer, testified that he was a patrol officer in May 2000 and that he responded to a dispatch call for a sexual assault or rape. Officer Warren arrived at the Pottebaum residence in uniform, and he spoke with Mrs. Pottebaum but not with J.P. After speaking

with Mrs. Pottebaum, he called for a youth services division detective, with whom he shared the information he had gathered. Officer Warren did not remember any injuries to Mrs. Pottebaum. On cross-examination, Officer Warren clarified that all of his information came from Mrs. Pottebaum.

DCS Investigator Stanley Cook testified that he was paged on May 14, 2000, for an "emergency referral" to the Pottebaum residence. Investigator Cook said he spoke with Detective Finchum, who was the youth services investigator, and did not speak with Officer Warren. Investigator Cook explained that his "primary responsibility [was] to go out, interview the victim, [and] ensure the victim [was] safe at [that time]." He said that, when interviewing the victim, he would initially try to "establish a rapport" and "try to assess the victim's cognitive ability in answering certain questions based on the referral . . . received at that time." He stressed that he did not want to lead the child to give a particular answer to any of his questions.

Investigator Cook then testified specifically about his interview with J.P.: "[She] had disclosed to me that several times she had been kissed in the mouth by her father and licked in her vagina[l] area by her father." J.P. told him that the Defendant would place her on his lap or on his face. She also told Investigator Cook that her father fondled her and described how her father ejaculated after he masturbated. J.P. told Investigator Cook that the Defendant told her not to tell anyone and he once asked if it felt good. J.P. said these incidents took place while her mother was at the store or her brother was in another room. Investigator Cook said he did not refer her for a medical examination because J.P. did not describe any penile penetration into her vagina.

On cross-examination, Investigator Cook explained he spoke with J.P. after he met with Mrs. Pottebaum. He said that J.P. understood what her father did to her and what she was saying to him. Investigator Cook confirmed that J.P. told him that "[the Defendant] had pulled out his thing and touched it while looking at her."

On redirect examination, Investigator Cook stated that the "majority" of the kids he interviewed were not upset or crying. Investigator Cook also said he was never given any information that suggested evidence could have been gathered from semen on clothes or sheets. Moreover, J.P. told him that there were six incidents of touching and licking by her father.

Holly Gallion, a pediatric nurse practitioner at Our Kids' Clinic, testified that she performed physical examinations on children referred to the clinic. She stated that she examined J.P. nearly two years after the allegations. She was alerted that there was genital fondling and oral sex with perhaps an attempt at digital penetration. Nurse Gallion was not expecting any medical findings with that history, and she concluded after the examination that J.P. had a "normal physical examination."

Officer Robert Campbell of the Metro Police Department testified that he prepared a warrant for the Defendant's arrest involving an alleged assault against Mrs. Pottebaum. He stated that the report was written out May 19, 2000, and that he photographed Mrs. Pottebaum's face as evidence.

He described her face as having "a slight bruising, a redness, to the left eye." Officer Campbell testified that it was not uncommon for bruises to develop a few days after a beating. On cross-examination, Officer Campbell said that the information in his report came from Mrs. Pottebaum and that she did not mention any witnesses to the attack.

Sergeant Shane Finchum with the Metro Police Department testified that he was the detective assigned from the youth services division to handle J.P.'s case. After he arrived at the scene, he spoke with Mrs. Pottebaum, who described what happened. Detective Finchum said he did not interview J.P., but he instead relied on the information she gave Investigator Cook to determine the investigation's next steps. Detective Finchum and Investigator Cook together decided that no medical examination was needed at that time because none of the physical evidence would have been recoverable. Detective Finchum said that, after his initial meeting with Mrs. Pottebaum on Mother's Day, he learned of the domestic violence between her and the Defendant. He helped connect Mrs. Pottebaum with the domestic violence unit to obtain a warrant for the Defendant. Detective Finchum also had Mrs. Pottebaum call the Defendant while he was in Kentucky and evading his arrest. During that phone conversation, the Defendant asked to speak with J.P. and called her "the little princess." Also during that conversation, the Defendant accused Mrs. Pottebaum of putting the idea that the Defendant molested J.P. in J.P.'s head. Detective Finchum added that the Defendant "made a statement that would suggest [he would beat Mrs. Pottebaum]." After the phone call, Detective Finchum went to Kentucky and spoke with the Defendant. He stated that the Defendant did not show any sadness about the allegations and insisted that the allegations would "go away" if Mrs. Pottebaum "would just leave it alone." On cross-examination, Detective Finchum said that, although he falsely represented to the Defendant that he had medical proof of sexual abuse to J.P., the Defendant never admitted to any wrongdoing.

The Defendant then presented the following evidence: Phyllis Thompson, a social worker at Our Kids' Clinic, testified that she interviewed children and caretakers about sexual abuse for the purposes of diagnosis and treatment. Thompson interviewed J.P. on April 4, 2002, after the District Attorney's office referred J.P. to Our Kids' Clinic. J.P. was eight years old at that time, and she had age-appropriate cognitive and language skills. Thompson said J.P. did not cry when she talked about the incidents. J.P. did not report to Thompson that the Defendant had either performed or requested that she perform oral sex. J.P. even denied that her father made oral contact with her genital region. Thompson said, "[J.P.] talked about her father touching her genital area with his hands."

On cross-examination, Thompson testified that she did not have copies of the social services report prepared by Investigator Cook or the police report prepared by Officer Warren or Detective Finchum when she interviewed J.P. Thompson explained that, because her interview focused on the physical health of the patient, she did not ask if J.P. saw the Defendant masturbating or was forced to watch pornography. Thompson also said she did not press J.P. when she denied oral sex occurred. Thompson said:

> [I]n this case she had already gone through an extensive investigation. She had already gone through treatment. She had already been discharged from treatment. And it was at a point where she was moving on with her life, and we were like grabbing her back in and saying, okay, we're going to focus on this one more time. And I was not okay with that.

The Defendant chose not to testify, but he entered into evidence pursuant to judicial notice and without objection, his testimony from his previous trial: He said he moved in with Mrs. Pottebaum and the children in April 2000. He said "[Mrs. Pottebaum's] housekeeping skills [were not] good, her parenting skills [were not] good, her personal hygiene skills [were not] good[,] and the house was in disarray." The Defendant stated that he and Mrs. Pottebaum "argued all the time." The Defendant worked "as much as [he] could," and Mrs. Pottebaum had not worked since 1999. He said that, while he lived at the house, he was never "totally alone" with J.P. and that there was always someone there at the house. The Defendant considered himself the household's disciplinarian and spanked both A.G. and D.P.

With respect to J.P., the Defendant stated that they "had a pretty good relationship." He said that, when he moved in, "[J.P.] was already having psychological problems. She was urinating and having bowel movements in her pants. She was lying. She was wetting the bed at night, and she was acting out in school. She wasn't getting good grades in school." J.P also suffered from head lice, so her mother shaved her head, which led to her schoolmates teasing her about being bald in addition to their taunting her about "smell[ing] like tuna fish." The Defendant said that he initially spoke with J.P. about her going to the bathroom in her pants, and then he spoke with her teacher about it. After that, he began spanking her when she soiled herself. The Defendant spent time with J.P. by attending church with her. He also cited that he bought McDonald's meals for J.P.'s seventh birthday party on April 12, 2000. The Defendant said that he accompanied Mrs. Pottebaum grocery shopping to the twenty-four hour WalMart once a month to buy food. He said Mrs. Pottebaum would only go grocery shopping in the middle of the night, so they would leave the children home alone sleeping while they went to WalMart.

The Defendant testified that, on May 12, 2000, the Defendant had a fight with Mrs. Pottebaum, which he described as happening frequently. After that particular fight, the Defendant told her he would leave for Hopkinsville, Kentucky, the Monday after Mother's Day. He said that Mrs. Pottebaum "started screaming and hollering at [him]" and "jumped on [him]." He said he "defended [him]self and retaliated back," but he denied giving Mrs. Pottebaum a black eye.

The Defendant stated that, on the morning of May 14, 2000, he saw D.P. was watching television and A.G. was still asleep from working late, but J.P. was missing. The Defendant said he looked for J.P. throughout the apartment complex for over an hour, and she eventually appeared at the doorstep in one of her t-shirts and a pair of underwear. The Defendant said he became angry with her and spanked her. He said that he and Mrs. Pottebaum then went to a friend's apartment to visit

with them. Mrs. Pottebaum left the friend's apartment before he did, and, when he returned to the house, he saw his family leaving in the car. Mrs. Pottebaum told him that they were going to Denise's house, which surprised the Defendant because they had plans to spend the day together. The Defendant then entered the house, packed his clothes, and left for Kentucky.

The Defendant said that Mrs. Pottebaum later called and told him that the children missed him, she needed money, and she needed him to fix her car. He returned to the apartment complex, but, when he saw the two police officers coming towards him, he fled. The Defendant said that he knew they were coming to get him on domestic violence charges from the fight he had with Mrs. Pottebaum.

The Defendant denied ever sexually molesting or inappropriately touching his daughter.

On cross-examination, the Defendant said the detectives interviewed him one-and-a-half years after he left Nashville. He said that, if Mrs. Pottebaum had "le[ft] it alone, it would all blow over because . . . [the allegations of sexual abuse were] false." The Defendant stated that he did not want to go to jail for domestic violence, and he denied hiding from the police. He said that, when he told Mrs. Pottebaum "I beat you up" during their phone conversation, he meant that he won the fight with her. The Defendant also clarified that when he hit Mrs. Pottebaum during that fight, he hit her with an open hand three or four times. When asked about his genital region, the Defendant described his penis as "above average," with an "average"-sized slit in its end. He suggested that J.P. saw penile orifices and ejaculation in pornographic movies. The Defendant said he bathed J.P. when she was smaller, but he did not bathe her when she was seven years old. The Defendant stressed that he was a good, active parent who loved J.P.

After hearing the evidence, the jury convicted the Defendant of two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault.

B. Sentencing Hearing

At the sentencing hearing, the State introduced a presentence report. The Defendant did not present any evidence. The trial court found no applicable mitigating factors, and it applied only the Defendant's prior convictions as an enhancement factor. It sentenced him to twenty-five years for each count of rape of a child, twelve years for each count of aggravated sexual battery, and eleven months and twenty-nine days for the count of assault. It then ordered all the felony sentences to be served consecutively, with the sentence for assault to be served concurrently with the other sentences. It is from these judgments that the Defendant now appeals.

III. Analysis

On appeal, the Defendant claims the trial court erred when it: (1) permitted the State to question the victim about the Defendant's prior bad acts; (2) did not dismiss Count 1 of the indictment pursuant to the cancellation rule; (3) instructed the jury that "recklessness" was sufficient as a *mens rea* for rape of a child; (4) determined that the evidence supported the verdicts; (5) enhanced the Defendant's sentence and ordered him to serve consecutive sentences. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

A. Prior Bad Acts

The Defendant claims that the trial court erred when it permitted the State to question the victim about the Defendant's prior bad acts. The Defendant cites three incidents of such prior bad acts: (1) the victim watching a pornographic movie in the Defendant's bedroom; (2) the victim seeing the Defendant masturbate; and (3) the victim's repeated references to the Defendant's ejaculations. The Defendant claims that such evidence was "irrelevant, highly prejudicial" and without probative value, especially given the State's election of other specific actions as the basis for its charges. The State argues that the trial court properly allowed the victim to testify about other misconduct by the Defendant because that conduct was part of the charged behavior.

Rule 404(b) of the Tennessee Rules of Evidence states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes." The court may admit the evidence for non-character purposes if four conditions are met:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). If a trial court "substantially complies" with these requirements, this court will review for an abuse of discretion. *State v. McCary*, 119 S.W.2d 226, 244 (Tenn. Crim. App. 2003) (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). If the evidence sought to be admitted is relevant to an issue other than the accused's character, such as identity, motive, common

scheme, intent, or rebuttal of accident or mistake, it may be admitted for that purpose so long as the danger of unfair prejudice does not outweigh the probative value. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.; *McCary*, 119 S.W.2d at 243. It has been recognized that "[i]n those instances where the prior conduct or acts are similar to the crimes on trial, the potential for a prejudicial result increases." *Id.* (citing *State v. Bordis*, 905 S.W.2d 214, 232 (Tenn. Crim. App. 1995)). Nevertheless, the Tennessee Supreme Court has allowed for admission of "[e]vidence of other sex crimes against a child victim . . . when the indictment is not time specific and when the sex crimes occurred within the time frame included in the indictment." *Id.* at 244 (citing *State v. Rickman*, 876 S.W.2d 824, 829 (Tenn. 1994)). This court has also admitted evidence of a "defendant's 'grooming' of a victim," which includes "bad acts committed during or in preparation for the charged offense." *State v. Wesley Earl Brown*, No. M2003-02801-CCA-R3-CD, 2005 WL 1412088, at *10 (Tenn. Crim. App., at Nashville, Jun. 16, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005). Such acts of "grooming" include showing pornographic videos to a child victim and providing marijuana to the child victim before the molestation. *Brown*, 2005 WL 1412088, at *10 (citing *Frazier v. State*, 557 S.E.2d 12, 18 (Ga. Ct. App. 2001); *State v. Blackstead*, 878 P.2d 188, 192 (Idaho Ct. App. 1994); *State v. Anderson*, 657 N.W.2d 245, 247-49 (N.D. 2003)).

The trial court in this case ruled that the evidence was admissible because it showed both the Defendant's "grooming" of the victim and that the acts were not independent of the crimes with which the Defendant was charged:

> **The Court**: [C]ourts have clearly recognized that the behavior that the defendant has toward the victim, grooming them, showing pornographic materials, other things, are clearly relevant to not only the relationship, the grooming, the intent to the motive, anything that the victim clearly has experienced and knows about in this entire time frame is clearly admissible. And it's going to be allowed to come in. And I cite not only the Wesley Brown case, but citing Frasier versus State. State versus Blackstead in a case – and they cite State versus Anderson, which is a case out of North Dakota. Anyway they say that the court concluded that since 404 is directed only to prior acts, which are independent of the crime charged, a defendant's letter, card, pornographic – all of that is clearly – it's clearly relevant and does not constitute inadmissible character evidence.
>
> So, one, to your first motion in limine, testimony prohibiting uncharged conduct, that is going to be denied. She will be allowed to testify.

We conclude that the trial court did not err by admitting the evidence at issue. The trial court held a hearing outside the presence of the jury to hear the arguments on the motion to suppress this evidence. *See* T.R.E. 404(b)(1). The trial court, when deciding to admit the evidence, stated on the

record that it was admitting the evidence because it was evidence of intent and motive of the Defendant. *See* T.R.E. 404(b)(2). The trial court emphasized that it also admitted the evidence because the actions took place within the same six to eight-week period when the Defendant's other alleged conduct that was charged as a crime occurred. *See* T.R.E. 404(b)(2). The trial court considered that the Defendant had the child victim watch pornographic movies and watch him masturbate to the point of ejaculation to be "grooming." *See* T.R.E. 404(b)(2). Although, the trial court did not explicitly state that it found the proof of the Defendant's prior bad acts was "clear and convincing," the record reflects that the trial court was quite familiar with Rule 404 and its requirements. In our view, the trial court substantially complied with Rule 404 and properly admitted the evidence of the Defendant's prior bad acts. The Defendant is not entitled to relief on this issue.

B. Cancellation Rule

The Defendant argues that Count 1 of the indictment, rape of a child, should be dismissed because the victim gave conflicting statements about the conduct underlying the charge in her testimony during the Defendant's two trials, the first in March 2004 and subsequently in February 2007.

In Tennessee, contradictory statements pertaining to the same fact made by a witness can cancel each other. *State v. Caldwell*, 977 S.W.2d 110, 118 (Tenn. Crim. App. 1997) (citing *Taylor v. Nashville Banner Publ'g Co.,* 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978)). "[I]f the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven." *Taylor*, 573 S.W.2d at 482. The Court of Appeals continued, "For his testimony to prove [the fact] is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way." *Id.* This rule is limited, though, and it "appl[ies] only when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence." *Id.*

In this case, the testimony at issue was elicited during the defense attorney's cross-examination of the victim, J.P., about her prior testimony from March 2004 about the Defendant's conduct with her on the living room couch:

> **Q**: Okay. Let's go to the second episode now. I believe that you testified it was an episode that occurred on the couch; okay? And this was in the living room; is that right?
>
> **A**: Yes.
>
> . . . .
>
> **Q**: Okay. I think you said he tapped on your shoulder, and then he rubbed on

you. No, excuse me, he licked you; is that correct? He performed oral sex on you at that time?

A: Yes.

Q: Okay. Now, do you remember in your testimony back in 2004 –

A: Yes.

Q: – when you were asked that question then. I would direct you to page forty-five if I could.

A: (Witness complies.)

Q: Start at page forty-five, line ten, and read to forty-six, line twenty-five.

A: (Witness complies.)

Q: Okay. So when you were asked about this couch incident back in March of 2004, at that time all you said was that he touched you. You never said anything about him licking on you, did you?

A: No, I guess no.

Q: Excuse me?

A: I said: "No, I guess not."

Q: Okay. So back in 2004 it was just touching, and today it's licking, right?

A: Do what?

Q: Back in 2004 it was just touching and today it's licking; is that right?

A: I don't know. That was a long time ago, so I guess I just got my facts wrong.

We conclude that the victim's sworn statements were inconsistent. She admitted to testifying in March 2004 that the Defendant rubbed her genitals with his hands while she was on the couch in the living room. She then testified in the February 2007 trial that the Defendant licked her genitals while she was on the couch in the living room. However, the victim did explain the inconsistency by saying that she "just got [her] facts wrong." That explanation is essentially a claim that she misstated the facts in the first trial. As such, the Defendant is not entitled to relief on this issue because the victim provided an explanation that the jury heard and could evaluate and because the two instances of testimony were not affirmatively in conflict.

C. Mens Rea Jury Instructions

The Defendant argues that the trial court erred when it instructed the jury that "recklessness" was sufficient as a *mens rea* for rape of a child, which lowered the State's burden of proof. The State argues that recklessness is a sufficient mens rea for rape of a child.

A trial court has the duty, in criminal cases, to fully instruct the jury on the general principles of law relevant to the issues raised by the evidence. *See State v. Burns*, 6 S.W.3d 453, 464 (Tenn. 1999); *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *State v. Elder*, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). Nothing short of a "'clear and distinct exposition of the law'" satisfies a defendant's constitutional right to trial by jury. *State v. Phipps*, 883 S.W.2d 138, 150 (Tenn. Crim. App. 1994) (quoting *State v. McAfee*, 737 S.W.2d 304 (Tenn. Crim. App. 1987) (quoting *Strady v. State*, 45 Tenn. 300, 307 (1868))). In other words, the court must instruct the jury on those principles closely and openly connected with the facts before the court, which are necessary for the jury's understanding of the case. *Elder*, 982 S.W.2d at 876. Because questions of the propriety of jury instructions are mixed questions of law and fact, our standard of review here is *de novo*, with no presumption of correctness. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001); *State v. Smiley*, 38 S.W.3d 521, 524 (Tenn. 2001).

Generally, "a defendant has a constitutional right to a correct and complete charge of the law." *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990), *superceded by statute on other grounds as stated in State v. Reid*, 91 S.W.3d 247 (Tenn. 2002). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court should "review the charge in its entirety and read it as a whole." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997) (citing *State v. Stephenson*, 878 S.W.2d 530, 555 (Tenn. 1994)). The Tennessee Supreme Court, relying on the words of the United States Supreme Court, has noted that:

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quoting *Boyde v. California*, 494 U.S. 370, 380-81 (1990)). A jury instruction is considered "prejudicially erroneous," only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *Id.* Even if a trial court errs when instructing the jury, such instructional error may be found harmless. *State v. Williams*, 977 S.W.2d 101, 104 (Tenn. 1998).

Rape of a child requires "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522 (1997). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the victim's . . . body, but emission of semen is not required." T.C.A. § 39-13-501 (7) (1997). Because the statutory definition of rape of a child does not plainly dispense with a mental element, "intentional", "knowing", or "reckless" conduct suffices to establish the culpable mental state. T.C.A. § 39-11-301(c) (1997); *see State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034 (Tenn. Crim. App. at Nashville, Nov. 30, 2004) (holding that, when considering the crime

of rape of a child, a jury can find the defendant guilty by determining the defendant acted intentionally, knowingly, or recklessly when he unlawfully sexually penetrated the victim and with respect to the element that the victim is age thirteen or younger), *perm. app. denied* (Tenn. Mar. 21, 2005); *see also State v. Thomas D. Stricklin*, No. M2005-02911-CCA-R3-CD, 2007 WL 1028535, at *15-18 (Tenn. Crim. App., at Nashville, Apr. 5, 2007), *perm. app. denied* (Tenn. Aug. 20, 2007). Moreover, the Committee on Pattern Jury Instructions "is of the opinion that the definitions of 'intentionally,' 'knowingly,' and 'recklessly' should all be charged for [the] offense [of rape of a child]." Comm. Pattern Jury Instructions Comments to 10.12. Thus, each element of rape of a child may be met by proving the defendant acted intentionally, knowingly, or recklessly.

The trial court provided the jury the following instructions on rape of a child:

> Counts 1 and 2: Rape of a child.
>
> For you to find the defendant guilty of this offense the State must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant had unlawful sexual penetration of the alleged victim or the alleged victim had unlawful sexual penetration of the defendant; and[]
>
> (2) that the alleged victim was less than thirteen (13) years of age; and[]
>
> (3) that the defendant acted either intentionally, knowingly, or recklessly.
>
> . . . .
>
> A person acts "intentionally" when that person acts with a conscious objective or desire:
>
> (1) to cause a particular result; and[]
>
> (2) to engage in particular conduct.
>
> A person acts "knowingly[“] if that person acts with an awareness:
>
> (1) that his or her conduct is of a particular nature; and[]
>
> (2) that a particular circumstance exists; and[]
>
> (3) that the conduct was reasonably certain to cause the result.
>
> A person acts "recklessly[“] if that person is aware of but consciously disregards a substantial and unjustifiable risk:
>
> (1) that a particular result will occur; and[]
>
> (2) that a particular circumstance exists.

We conclude that the trial court properly instructed the jury with respect to the *mens rea* required for rape of a child. As previously stated, recklessness is acceptable as a mental state for rape of a child, and the trial court instructed the jury accordingly. The Defendant is not entitled to relief on this issue.

D. Sufficiency of the Evidence

The Defendant argues that considering J.P.'s inconsistent statements between the two trials, the evidence was not sufficient to support his convictions for two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn.

1963)). This Court must afford the State the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

1. Rape of a Child

The Tennessee Code Annotated defines the crime of rape of a child as "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522 (1997). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the victim's . . . body, but emission of semen is not required." T.C.A. § 39-13-501 (7) (1997).

For Count 1, the State elected the facts that the Defendant performed oral sex on J.P. in the living room of their house. In the light most favorable to the State, the evidence proves that J.P. was sitting on the couch in the living room when the Defendant "tapped [her] shoulder." He then removed her pants and underwear, and he "licked" her "private part." After performing this act on her, he told her not to tell anyone. The victim was between six and seven years old at the time. This evidence supports the conclusion that the Defendant intentionally performed cunnilingus on a child aged less than thirteen years old; thus, we conclude that the Defendant's conviction for rape of a child in Count 1 was sufficiently supported by the evidence.

For Count 2, the State elected the facts that the Defendant forced J.P.'s lips to his penis in her bedroom. The testimony specific to those facts reads as follows:

[J.P.]:	I was in my room, I believe. And he sat down next to me, and he started to unbutton his pants. And then he pulled them down to his ankles and then he . . . grabbed the back of my head and tried to force it down, but I jerked away.
[State]:	Did any part of your body come in contact with any part of his body?
[J.P.]:	The tip of my lips did.
[State]:	Okay. And where did the tip of your lips touch?
[J.P.]:	The tip of his private part.
[State]:	Did his private part go inside of your mouth?
[J.P.]:	No.

In *State v. Marcum*, the Tennessee Supreme Court held that "there is no expressed requirement within [the statute defining sexual penetration] that "intrusion" into the mouth is necessary to accomplish fellatio." 109 S.W.3d 300, 303 (Tenn. 2003). Rather, mere contact between the defendant's penis and the victim's mouth or lips is sufficient. *Id.* The victim in this case testified that her lips touched the Defendant's penis. The Defendant had grabbed her head and forced it to his penis, which proves his intention to perform the act. Additionally, he knew she was under age thirteen at the time he did this. This is sufficient to support the Defendant's conviction for rape of a child in Count 2.

2. Aggravated Sexual Battery

As we stated above, the Tennessee Code Annotated defines the crime of aggravated sexual battery as "unlawful sexual contact with a victim by the defendant . . . accompanied by any of the following circumstances . . . (4) The victim is less than thirteen (13) years of age." T.C.A. § 39-13-504 (1997). "'Sexual contact' includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." T.C.A. § 39-13-501(6) (1997). "'Intimate parts' includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being." T.C.A. § 39-13-501(2) (1997).

For Count 3, the State elected the facts that the Defendant fondled the genitals of J.P. with his fingers in her bedroom. The evidence considered in the light most favorable to the State shows that the Defendant entered the victim's bedroom while she was watching television. He told her "to lay down," which she did. The Defendant then removed her pants and underwear while directing her to "cooperate." She stated that he then "rubb[ed]" his hand on her genital region for "a few minutes." J.P. said he used one hand and touched her skin directly. She described it as making her "very uncomfortable." The victim was six to seven years old at the time. This evidence shows that the Defendant intentionally touched the victim's genital region for sexual arousal or gratification while the victim was under age thirteen. This is sufficient to support his conviction for aggravated sexual battery in Count 3.

For Count 4, the State elected the facts that the Defendant fondled the genitals of J.P. with his fingers in her mother's bedroom. The evidence taken in the light most favorable to the State shows that the Defendant called the victim into her mother's bedroom, where he removed her clothes and had her lay on the bed. The Defendant then spread her legs and touched her genitalia with three fingers. The victim was under age thirteen at the time. This evidence shows the Defendant intentionally touched the victim's genital region for sexual arousal or gratification while the victim was under age thirteen. This is sufficient to support his conviction for aggravated sexual battery in

Count 4. The Defendant is not entitled to relief on this issue.

3. Assault

The Tennessee Code Annotated states, "A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another." T.C.A. § 39-13-101(a)(1) (1997). The Defendant admitted that he hit Mrs. Pottebaum Pottebaum four times on her head. He said that he was acting in defense and then began retaliating against her. Mrs. Pottebaum stated that she and the Defendant had a domestic dispute where he hit her head while she protected her face with her hands and arms. The evidence shows that the Defendant intentionally or knowingly caused bodily injury to another, and the evidence is sufficient support for the Defendant's conviction for assault on Mrs. Pottebaum Pottebaum. The Defendant is not entitled to relief on his claim that the evidence does not sufficiently support his conviction.

E. Sentencing

The Defendant argues that the trial court erred when it sentenced him above the minimum sentence in the sentencing range and when it ordered his felony sentences to be served consecutively. Specifically, he contends that the trial court violated his constitutional right to judicial fact-findings when it enhanced his sentence using "non-criminal history factors." The State argues that the trial court properly sentenced the Defendant.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4)

the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

1. Length of Sentence

The trial court sentenced the Defendant to serve twenty-five years for each count of rape of a child, twelve years for each count of aggravated sexual battery, and eleven months and twenty-nine days for the count of assault. When sentencing the Defendant, the trial court stated:

> I find no mitigating factors today. But I think under the circumstances of the way the law is and the fact that [*Blakely*][2] would apply in this case and they've vacated [*Gomez*][3], I'm going to find factor number two. That is that he has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. He now even has another felony conviction in addition to all of those that were – that have been set out in the presentence report.
>
> I'm not going to use factor number sixteen even though in his prior trial he did indicate that he was the reason – he was disciplining [J.P.] and because he was the main sort of new father figure that . . . created this problem for her. I'm not going to find that factor because, again, I think *Blakely* does that. No mitigating factors in this case whatsoever.
>
> And as a result of that, I'm going to, starting at the midpoint of the range, in Counts 1 and 2[,] I'm going to sentence him to twenty-five years on each one of those. In Counts 3 and 4, considering only his prior convictions, I'm going to give him a twelve-year sentence on each one of those and then the 11/29 on the assault. So the only thing left for me to determine then – and these are all Range 1 offender sentences even though the release eligibility is going to be rather high for Counts 1 and 2.

In Tennessee, if the defendant committed his crime before June 7, 2005, but is sentenced after June 7, 2005, he may either be sentenced under the 1989 Criminal Sentencing Act and in accordance

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[2] *Blakely v. Washington*, 542 U.S. 296 (2004).

[3] *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).

with *Blakely* and *State v. Gomez*, or he may sign a waiver that allows the trial court to sentence him under the 2005 Sentencing Reform Act. *Blakely*, 542 U.S. 296; *Gomez*, 239 S.W.2d at 722. Rape of a child is a Class A felony, and it is punishable by a sentence ranging from fifteen to twenty-five years of incarceration. T.C.A. §§ 39-13-522, 40-35-112(a)(1) (2006). Aggravated sexual battery is a Class B felony, and it is punishable by a sentence ranging from eight to twelve years of incarceration. T.C.A. §§ 39-13-504, 40-35-112(a)(2) (2006). Assault is a Class A misdemeanor, and it is punishable by up to eleven months and twenty-nine days in jail. T.C.A. §§ 39-13-101(b); 40-35-111(e)(1) (2006).

The Defendant committed these crimes in May 2000 and was sentenced in June 2007. It does not appear that the Defendant signed a waiver for the trial court to sentence him under the 2005 Sentencing Reform Act.[4] *See* T.C.A. § 40-35-210 (2006). Therefore, we must apply *Blakely* and its progeny to our review. *Blakely v. Washington*, 542 U.S. 296 (2004). After a review of the trial court's findings, we conclude that the trial court considered only the Defendant's prior convictions when enhancing his sentence. The Defendant's prior convictions included: three counts of driving while intoxicated; two counts of public intoxication; two counts of driving on a suspended or revoked license; and one count each of aggravated assault, driving without auto insurance, evading arrest, criminal trespassing, burglary of the third degree, simple possession, simple assault, and burglary of other than a habitation. Considering these prior convictions, we conclude the trial court properly enhanced the Defendant's sentences to the maximum allowed for each conviction. The Defendant is not entitled to relief on this issue.

2. Consecutive Sentences

The Defendant argues that the trial court erred when it sentenced him to serve his felony sentences consecutively because the trial court relied on facts additional to his prior criminal history that the jury did not find. The State argues that the trial court properly ordered consecutive sentences because the Defendant had been convicted of two or more statutory offenses involving sexual abuse of a minor.

When a defendant has more than one criminal conviction, the trial court must order the sentences for each conviction to run either concurrently or consecutively. T.C.A. § 40-35-115 (2006). The Tennessee Code has established guidelines for when the trial court may order the defendant to serve consecutive sentences:

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[4] The legislature amended the Sentencing Reform Act of 1989, with the changes taking effect on June 7, 2005. When, as in this case, the crime occurred before June 7, 2005, the Defendant may "choose" the sentencing scheme for the trial court to use when sentencing him. *See State v. Joe Allen Brown*, No. W2007-00693-CCA-R3-CD, 2007 WL 4462990, at *4 n 1 (Tenn. Crim. App., at Jackson, Dec. 20, 2007), *no Tenn. R. App. P. 11 application filed*.

> The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> . . . .
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

T.C.A. § 40-35-115(b)(5) (2006). The presence of a single factor is sufficient to justify consecutive sentencing. *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Moreover, the Tennessee Supreme Court has recently held that "*Apprendi* and *Blakely* simply do not require the jury to determine the manner in which a defendant serves multiple sentences. That Tennessee's statutes require (in most instances) trial courts to make specific factual findings before imposing consecutive sentences does not extend the reach of *Apprendi* and *Blakely*." *State v. Allen*, 259 S.W.3d 671, 690 (Tenn. 2008) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely*, 542 U.S. 296).

When the trial court ordered the Defendant to serve Counts 1, 2, 3, and 4 consecutively and Count 5 concurrently with the other counts, it enunciated that it based that order on the Defendant's multiple convictions for sexual abuse of a minor:

> But the issue with regard to multiple sentencing, I previously relied on factor number five. And that is he has been convicted of two or more statutory offenses involving sexual abuse of a minor with consideration for the aggravating circumstances arising from the relationship between the defendant and the victim, which would be father and child. The timespan of the defendant's undetected sexual activity, which was not that great, and the nature and scope of the sexual acts and the extent of the residual and physical and mental damage to the victim. I think clearly I have observed several years later the damage that still exists with the victim having had to go through these trials and having been able to observe her for these times. So I'm going to find that the facts and circumstances testified to in this trial definitely support factor number five. I'm therefore going to sentence him to consecutive sentences. Count 5 is going to run concurrent, but all the others were going to be consecutive. So that would be a total of seventy-four years, correct?

We conclude that the evidence does not preponderate against the trial court's ordering the Defendant's sentences for Counts 1, 2, 3, and 4 to be served consecutively. The Defendant had been convicted of four statutory offenses involving sexual abuse of a minor. T.C.A. § 40-35-115(b)(5). When considering the relationship between the defendant and the victim and the time span of his

undetected sexual activity, we recognize that he was her father, and he completed these acts within four to six weeks. As for the nature and scope of the sexual acts, the Defendant performed cunnilingus on her, made her touch his penis with her lips, and touched her repeatedly in her genital area after removing her pants. Finally, taking account of the residual, physical and mental damage to the victim, J.P. had to obtain counseling as a result of these actions. The trial court properly ordered the Defendant's sentences to be served consecutively because he had multiple convictions of offenses involving sexual abuse of a minor. The Defendant is not entitled to relief on this issue.

IV. Conclusion

After a thorough review of the record and the applicable law, we conclude: (1) the trial court properly admitted evidence of the Defendant's prior bad acts; (2) the trial court properly rejected the "cancellation rule" as a basis to dismiss Count 1 of the indictment; (3) the trial court properly instructed the jury on the *mens rea* required for rape of a child; (4) the evidence presented was sufficient to sustain the convictions; and (5) the trial court properly sentenced the Defendant. We affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE